

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEVEN MICHAEL EMERSON,

Defendant-Appellant.

UNPUBLISHED

September 14, 2006

No. 260355

Kent Circuit Court

LC No. 03-011856-FC

Before: Sawyer, P.J., and Fitzgerald and O’Connell, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree home invasion, MCL 750.110a(2), and first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(c). He was sentenced as an habitual offender, fourth offense, MCL 769.12, to 3 to 50 years’ imprisonment for the home invasion conviction, and 30 to 90 years’ imprisonment for the first-degree CSC conviction. Defendant appeals as of right. We affirm.

The victim, eighteen-year-old L.S., testified at trial that she slept in the basement of the house she shared with her two siblings, their father, and another roommate. She awoke in the early morning hours to find defendant lying on top of her, with his hand over her mouth. Defendant held her facedown and attempted sexual intercourse several times, but he never achieved more than partial penetration because he was unable to maintain an erection. He kissed her mouth and breasts, digitally penetrated her vagina, and forced her to perform fellatio before leaving the house. At times during the assault, defendant’s hand prevented L.S. from breathing, and he struck her face when she struggled. Immediately after the incident, L.S. identified defendant, her next-door neighbor, as her assailant. Defendant’s DNA was found on the victim’s face and on her breasts.

Defendant first argues on appeal that his constitutional due process rights were violated by the trial court’s denial of his motion to adjourn trial for the purpose of having additional DNA testing performed on certain evidence, namely, his fingernail clippings, a condom collected from L.S.’s bedroom floor, and a stained area cut from her mattress. We review the grant or denial of an adjournment for an abuse of discretion. *People v Snider*, 239 Mich App 393, 421; 608 NW2d 502 (2000). “Some factors to be considered include whether defendant (1) asserted a constitutional right, (2) had a legitimate reason for asserting the right, (3) had been negligent, and (4) had requested previous adjournments.” *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992). Due process does not require that the prosecution seek and find exculpatory

evidence or test evidence for a defendant's benefit. *People v Coy*, 258 Mich App 1, 21; 669 NW2d 831 (2003). Moreover, we will not reverse a trial court's refusal to order DNA testing in cases where other significant identification evidence is presented against the defendant or where the exculpatory theory about the evidence is highly speculative. *People v Sawyer*, 215 Mich App 183, 192; 545 NW2d 6 (1996).

We find no abuse of discretion in the trial court's decision. The defense had already delayed trial to obtain testing that demonstrated that defendant's DNA was present on the victim. The theory asserted at the time the trial court heard the motion for adjournment was that the defendant and the victim engaged in some consensual sexual acts in exchange for drugs for the victim's brother. According to the defense, the lack of defendant's DNA on an untested condom, mattress stain, and his fingernails might partially exonerate him. Given the ongoing delay, which only resulted in inculpatory evidence, however, defendant's theory would not have been substantially advanced. Preliminary testing revealed that no bodily fluids were detected in the condom, and the victim testified that defendant never ejaculated. Although defendant presented evidence at trial that the victim's boyfriend broke in on them and interrupted his sexual activity, perhaps implicating the boyfriend, the trial court was not privy to this testimony when it ruled. Because defendant asserted that L.S. engaged in consensual sexual acts with him in exchange for drugs, the presence or absence of DNA on the condom, mattress stain, or his fingernails had speculative value. Defendant's police interview, the victim's familiarity with and positive identification of defendant, her injuries, and the presented DNA evidence provided overwhelming evidence of defendant's guilt at trial. In sum, defendant has not demonstrated that the trial court abused its discretion by going forward with trial, and defendant fails to demonstrate that he was prejudiced by the trial court's failure to adjourn trial in order to conduct additional DNA testing. On this record, the trial court's refusal to adjourn trial did not constitute an abuse of discretion.

Defendant next argues that the trial court erred in admitting evidence of defendant's other acts of criminal sexual conduct against three women under MRE 404(b) during the prosecutor's rebuttal. We disagree. We review the admissibility of other-acts evidence for an abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). The trial court did not abuse its discretion in admitting evidence that defendant committed sexual assaults against the other women. The prosecutor introduced the testimony to rebut the defense theory that L.S. consented to the sexual relations as part of a sex-for-drugs exchange and to show the existence of a system or plan by which defendant accomplished sexual assaults. The trial court correctly determined that these are proper purposes under MRE 404(b)(1). *People v Sabin (After Remand)*, 463 Mich 43, 61-62; 614 NW2d 888 (2000). The other acts need only support the inference that the defendant employed the common plan in committing the charged offense. *People v Hine*, 467 Mich 242, 252-253; 650 NW2d 659 (2002).

Here, the other acts and the charged offenses shared sufficient common features to infer a plan or scheme. Defendant entered the home of each victim, surprised them, and forcibly gained control over them. They were held face down, positioned in the same way, and defendant used his hand to cover each victim's mouth. In each case, the victims were deprived of air in a nearly identical fashion. A defendant's actions need only "demonstrate circumstantially that the defendant committed the charged offense pursuant to the same design or plan he or she used in committing the uncharged acts." *Sabin, supra* at 66. Because the evidence here demonstrated,

circumstantially, defendant's common scheme or design, the trial court did not abuse its discretion when it allowed this evidence.

Defendant next argues that the trial court erred when it allowed the prosecutor to admit a videotape of defendant's interview with police. We disagree. Defendant did not object to the admission of the tape at trial, so we review this issue for plain error that affected defendant's substantial rights. MRE 103(d). The interviewing officer testified that poor equipment made some of the interview difficult to hear, so those parts were omitted. The officer reviewed the videotape that was played at trial and found it to be accurate. Defendant failed to move the trial court for inclusion of the unedited original according to MRE 106 or MRE 1004, and he fails to cite any legal authority or factual basis for prejudice. "An appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue." *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004). Additionally, defendant was not deprived of his due process right to be tried on the charges against him within 180 days. Defendant fails to present any evidence that he was incarcerated in state prison while awaiting trial, so the 180-day rule is inapplicable to him. MCL 780.131; *People v McLaughlin*, 258 Mich App 635, 643; 672 NW2d 860 (2003).

Affirmed.

/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell